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IN THE

Supreme Court of the United States

October Term, 1966

No. 818

EVERT L. HAGAN,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES,
Respondent.

HAROLD V. BOISVERT, R. BROWN, JOE SWEAT, and COUNTY OF LOS ANGELES,
Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES.

EVERT L. HAGAN,
115 North Eastern Avenue,
Los Angeles, California 90022
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Petitioner,
IN PRO SE.

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HAROLD V. BOISVERT, R. BROWN, JOE SWEAT, and COUNTY OF LOS ANGELES,

Real Parties in Interest.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Evert L. Hagan, hereby requests leave to file the attached petition for a writ of certiorari.

Said petition is based upon the facts, reasons and grounds stated in the petition and petitioner relies thereon.

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EVERT L. HAGAN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES.

Evert L. Hagan, petitioner herein, prays that a writ of certiorari issue from this Court to the Superior Court of the State of California, for the County of Los Angeles, to review the issuance of a peremptory writ of prohibition and mandate preventing the prosecution of an action by petitioner in the Municipal Court of the Los Angeles Judicial District.

OPINIONS BELOW

The Superior Court of the State of California, for the County of Los Angeles issued a peremptory writ of prohibition and mandate on December 3, 1964.

The District Court of Appeal of the State of California, Second Appellate District, Division Two, affirmed the writ of prohibition and mandate on May 24, 1966.

The Supreme Court of the State of California denied petitioner a hearing on the matter on July 20, 1966.

JURISDICTION

The writ of prohibition issued.

Petitioner appealed to the District Court of Appeals, State of California, Second Appellate District from the writ of prohibition and mandate issued by the Superior Court of Los Angeles County, Honorable A. Curtis Smith, on December 3, 1964.

Petitioner filed for and requested a hearing in the Supreme Court of the State of California, which Court denied hearing on July 20, 1966.

Jurisdiction of this Court is invoked under the 4th, 5th, 8th and 14th amendment to the Constitution of the United States and 28 U.S.C. Section 1343 and 42 U.S.C. Section 1983.

QUESTIONS PRESENTED

1. Were petitioner's Civil Rights violated by denial of due process in the issuance of the writ of prohibition and mandate?

2. Are California State Government Codes, Sections 911.2, 915, 945.4 and 950.2 repugnant to the Constitution of the United States in denying equal protection of the laws and as class legislation in excess of that required by the State to protect itself?

3. Was the District Court of Appeal, State of California, Second Appellate District in error in holding that said aforementioned California Government Codes were a bar to the within action?

4. Was petitioner deprived of his United States Constitutional rights under color of State authority?

STATUTES INVOLVED

4th Amendment to the U.S. Constitution.
5th Amendment to the U.S. Constitution.
8th Amendment to the U.S. Constitution.
14th Amendment to the U.S. Constitution.
28 U.S.C. Section 1343.
42 U.S.C. Section 1983.
California Government Code, Section 911.2.
California Government Code, Section 915.
California Government Code, Section 945.4.
California Government Code, Section 950.2
California Court Rule 211 (b).

STATEMENT OF THE CASE

Petitioner's guaranteed U.S. Constitutional rights were violated by the Courts of the State of California in that petitioner's property was seized and his liberty deprived without due process.

HAPPENINGS BELOW

1. Evert L. Hagan, petitioner herein, appeared before the real party in interest, Mr. Harold V. Boisvert, a Superior Court Commissioner in Los Angeles County, in an action number 704,192, records of the Superior Court of the State of California for the County of Los Angeles, on October 1, 1963. Thereafter, Pre-Trial order was issued on October 2, 1963, terminating the Pre-Trial proceedings in that matter.

Subsequent thereto, on November 22, 1963, petitioner moved in the Superior Court in Los Angeles County, for permission to file a cross-complaint, in the aforementioned Superior Court action No. 704,162. This motion was assigned by the Presiding Judge to Mr. Boisvert, who had sat in the aforementioned Pre-Trial hearing, as a Judge Pro Tempore. Petitioner stated at that time that Mr. Boisvert was not acceptable to him. The Presiding Judge stated that petitioner's move for disqualification of Mr. Boisvert should be raised before Mr. Boisvert.

Petitioner, with counsel, went to a courtroom, where Mr. Boisvert was awaiting with a Court Reporter. On

the case being called, and without permitting any defense, Mr. Boisvert held petitioner and his counsel in contempt for the reason that petitioner had in his possession a pocket recorder.

After sentence was pronounced as five days, (without bail), Mr. Boisvert ordered petitioner searched in the courtroom and the recorder deposited with the clerk, and petitioner and his counsel spent that day and night in jail, being released on a writ of habeas corpus the afternoon of the next day.

Before the District Court of Appeal, State of California, Second Appellate District, petitioner prevailed on his petition for a writ of habeus corpus, but his recorder has not been returned to him by Los Angeles County. Petitioner then brought action for the return of the recorder and another action for damages for unlawful imprisonment. (Appendix A)

The Local Rules (Appendix A) of the Superior Court for Los Angeles County, provide that Pre-Trial matters cannot be reported without consent of all of the parties, and this assignment to Mr. Boisvert, was in the Pre-Trial Master Calendar Court. The position of Mr. Boisvert and his County Counsel that it was a Pre-Trial hearing is not shared by your petioner. Your petitioner contends that the Pre-Trial terminated on October 2, 1963, when Mr. Boisvert signed the "Pre-Trial Order." Nevertheless, in furtherance of a conspiracy to deprive petitioner of his Civil Rights, and

to prevent him from having a trial before a full fledged judge, and to obtain his recorder, Mr. Boisvert, did, in fact have a Court Reporter present in his courtroom, to report his soliloquy. Within thirty days from his release from jail, petitioner, through his counsel, wrote to the Presiding Judge of the Superior Court of the said Superior Court, the Honorable McIntyre Faries, asking for the return of the recorder. This letter is attached and marked Appendix "C" and Judge Faries' reply is attached as Appendix "D."

Tiring of this intemperate conduct, petitioner was force to file an action for conversion and damages in the Municipal Court of the Los Angeles Judicial District, No. 714-83. County Counsel for Los Angeles County stalwartly defended Mr. Boisvert, a County or State employee, on the grounds that petitioner's letter to the Presiding Judge did not constitute a proper claim under the California Government Code, Sections 911.2, 915; 945.4 and 950.2. All of this despite the fact that Mr. Boisvert was not sitting as a judge pro tempore, but solely acting as an employee of the Los Angeles County Superior Court. Mr. Boisvert prevailed on a writ of prohibition and mandate, preventing prosecution of petitioner's action, depriving petitioner of his Civil Rights, his day in court, his recorder and his freedom for approximately 24 hours.

Quoting from *In Re Hagan,* 224 Cal. App. 2d, 590, at page 592, the following is a verbatim report of the hearing before Mr. Boisvert:

"THE COURT: First of all, I want to know, does anyone have any equipment to record this particular hearing?

"Mr. EVERT L. HAGAN: Yes, sir, I have. I am recording what you are saying right now.

"THE COURT: I hereby hold you in contempt of court.

"MR. HAGAN: Very well.

"THE COURT: You are sentenced to five days in county jail.

"THE COURT: Mr. Hamilton (Hagan's counsel), are you aware that this man had this equipment?

"MR. HAMILTON: No.

"THE COURT: Mr. Hamilton, on a previous occasion, Mr Hamilton —

"MR. HAMILTON: I know he uses it from time to time.

"THE COURT: You participated in an application for a writ of supersedeas in aid of appellate jurisdiction. At that time, you filed with the Court of Appeal material which was taken by a recording.

"MR. HAMILTON: Yes.

"THE COURT: Did you know that that was taken by —

"MR. HAMILTON: Yes.

"THE COURT: All right. I hereby hold you in contempt of Court and sentence you to five days in jail. The motion will be continued until — I want this man —. I want the bailiff brought in and this equipment taken from him right away and you are to proceed to jail forthwith."

Mr. Boisvert and the others involved violated the 4th Amendment to the Constitution of the United States by their unreasonable search of petitioner and their unreasonable seizure and retention of petitioner's recorder, and violated the 5th Amendment of the U.S. Constitution by forcing petitioner to be a witness against himself, and by depriving him of his liberty and property without due process of law, and violated the 8th Amendment of the U.S. Constitution by inflicting cruel and unusual punishment, and further violated the 14th Amendment of the U.S. Constitution by their oppressive acts, all without due process of law.

REASONS FOR GRANTING THE WRIT

I.

This Court recognizes that the infringement of basic freedoms by governmental actions violates due process of law, if reasonable alternatives which infringe less are available to the government. For instance, in *Robinson v. California*, 370 U.S. 670, 677-678, a 1952 case, it is said:

> "a prosecution for addiction, with its resulting stigma, is irreparable damage to the good name of the accused, and cannot be justified as a means of protecting society, for a civil commitment would do as well."

Also in *Dennis v. United States,* 341 U.S. 494, (1951), advocacy of peaceful change was held to be suitable alternative to advocacy of violent overthrow of government, and therefore government was justified in imposing sanctions on the latter in the interest of sovereign survival. A reasonable approach, therefore, demands analysis of the goal to be achieved and anlaysis of the alternative means of achieving a goal.

The summary procedure to which your petitioner was subjected herein by Commissioner Boisvert, without hearing, violates the fundamental norm of due process in that petitioner's actions were predetermined and unusual punishment inflicted without giving petitioner an opportunity to prepare and present a defense before an impartial tribunal.

Justice Frankfurter has said:

> "among the restrictions to be implied, as a matter of course, are two basic principles of law, that no judge should sit in a case in which he is personally involved, and that no criminal punishment should be meted out except on notice and due hearing." *Sacher v: United States,* 341 U.S. 29, (1952), dissenting opinion).

The justification for the use of summary procedure relative to the actions involved herein shows patently that the denial of a hearing cannot be justified as a reasonable compromise.

Knowledge of wrongdoing and intent to do wrong should be revelant when one is imprisoned and his property summarily siezed. A hearing should have been conducted to permit petitioner to present evidence and justification of his actions.

The review of the facts, although favorable to petitioner at the appellate level, did not return to petitioner his time lost in jail nor his recorder. As can be noted from the Boisvert quotation, petitioner was prejudged and maliciously entrapped by a judicial conspiracy involving more than the two judges and two sheriffs, who acted unlawfully against petitioner on that date. See *Ungar v. Sarafate,*

> "an impartial judge, not caught up in the cross-currents of emotions involved enveloping the con-

tempt charge, is the only one who can protect all rights and determine whether a contempt was committed, or whether the case was either one of judicial nerves on edge or judicial tyranny."

In *Cooke v. United States,* 267 U.S. 517, (1924), Chief Justice Taft said:

"The Court in *Savin-Petitioner,* 131 U.S. 267, applied this rule to proceedings in contempt. Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel if requested, and the right to hear testimony, relevant either to the issue of complete exculpation, or in extenuation of the offense and in mitigation of the penalty to be imposed."

Justice Frankfurter's words in *Offutt v. United States,* 348, U.S. 1117 (1954), are applicable here:

"Our concern is with the fair administration of justice. The record discloses not a rare flareup, not a show of evanescent irritation. A modicum of quick temper must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with your petitioner."

The case cited of *Hagan,* indicates the insidious nature of the entrapment and seizure of the recorder by the conspirators.

The following is from Justice Roger Traynor's dissent in *Chula v. Superior Court,* 57 Cal. 2d, 199, at page 208:

> "The classification of contempt as direct and indirect is merely a semantic device for differentiating contempt that can be adjusted summarily, from those that can be adjudicated only after adequate notice and hearing. When a contempt occurs within the immediate view and presence of the court, the judge is fully informed of all the facts necessary to adjudicate the guilt or innocence of the alleged contemnor. When, however, the court is not so informed of such facts, notice and hearing are necessary to get them."

From 39 Minnesota Law Review, at page 896:

> "The inherent power of courts to punish contempt summarily arose from the court's necessity of self preservation, or of precluding obstruction to their administration of justice. Summary contempt procedure forms an exception to the requirements of normal due process and is limited in application to cases where the contomacious behavior occurs in the immediate view and presence of the court, i.e., to direct contempts. Power to punish contempt summarily is arbitrary and should not be uselessly amplified."

In 5 Duke Bar Journal, at pages 158 and 159:

"This latter observation raises a broader question as to whether there actually are any situations, in which the summary powers are necessary to accomplish the ends which purportedly justify its use."

"It is suggested that the reasoning advanced to support this power often fails to distinguish between punishment, which is sufficient to remove an obstruction to the administration of justice, or to vindicate the dignity of the court and punishment which is necessary to accomplish these purposes. Indeed, if the test of necessity is applied to the various situations, in which the power has been invoked, the apparent conclusion, is that it has no justification at all. Consider, for example, the clearest case — a calculated disturbance in the courtroom, intended by its perpetrator not only to obstruct the proceedings, but to insult the court. Instead of punishing the offender summarily, the judge could order him arrested and charged with the crime of contempt. The obstruction to the administration of justice would thereby be removed; and the vindication of the dignity of the court could be postponed to a separate hearing."

"At least one commentator has maintained, that the summary contempt power should be continued to be tolerated as a petty power to deal with petty offenses. To this it might be answered, that, if the offenses are petty, they should not justify an exception to constitutional right. The

only basis for such an exception is not expediency but necessity; and absent necessity, exception should fail."

II.

RE BOISVERT'S IMMUNITY AND THE CIVIL RIGHTS ACT

In Robichaud v. Roanan, 351 Fed., 2d, 533 (1966) it is stated on page 535:

"No immunity from liability for the prescribed conduct is mentioned in the statute, but courts have engrafted an immunity in favor of certain public officials for acts done in the performance of their traditional official functions. The immunities recognized in these cases are generally those which were respected under common law. See, for example, *Tenny v. Brandlove,* 341 U.S. 367 71 Sp. Ct. 783, 95 L.Ed. 1019. . . .The arguments generally advanced in support of immunity are (1) the danger of influencing public officials by threat of a law suit, (2) the deterent effect of potential liability on men who are considering entering public life. (3) The drain on the valuable time of the official caused by insubstantial suits. (4) The unfairness of subjecting officials to liability for the acts of their subordinates. (5) The theory that the official owes a duty to the public and not to the individual. (6) The feeling that the ballot and the formal removal proceedings, are far more appropriate ways to enforce the honesty and efficiency of public officers.

". . . We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi judicial capacity, then the reason for this immunity — in integral relationship between his acts and the judicial process — ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of his rights, privileges, or immunities secured by the Federal Constitution and laws. See *Monroe v. Pappe,* 365 U.S. 167. . . .To us, it seems neither appropriate nor justifiable, that for the same act, immunities should protect the one, and not the other. . . .The trial court must determine the nature of the acts alleged to have been wrongfully committed, for the appellees may have abandoned their 'quasi-judicial role. If, they, so doing, committed acts, or authoritativly directed the commission of acts, which ordinarily are related to a police activity, as opposed to judicial activity, then the cloak of immunity should not protect them."

Your petitioner submits that Mr. Boisvert was not sitting as a Judge Pro Tempore, and therefore as a Court Commissioner, he did not have jurisdiction to hold your petitioner in contempt and was without any judicial immunity he might have otherwise held as a Judge where Civil Rights questions were absent.

In *Jonson v. Agnne,* 355 Fed. 2d, 129 (1966) it is stated on page 133:

"It should be equally clear that both the language and the purpose of the Civil Rights Acts, are inconsistent with the application of the common law notions of official immunity in all suits brought under these provisions. See *Norton v. McShain,* 332 Fed. 2d, 855, 861. In suits brought under Section 1983, 42 U.S.C. (the Civil Rights Act), an indispensable element of a plaintiff's case, is a showing that the defendant (or defendants), acted, 'under color of any statute, ordinance regulation, custom or usage of any state.' (42 U.S.C. 1983).

. . . Furthermore, and perhaps more basically the purpose of Section 1983 as well as the other Civil Rights provisions, is to provide a Federal remedy for the deprivation of the Federally guaranteed rights, in order to enforce more perfectly Federal limitations on unconstitutional state actions. To hold all state officers immune from suit, would largely frustrate the salutary purpose of this provision. We conclude the defense of official immunity should be applied sparingly in suits brought under Section 1983."

III.

RE CALIFORNIA CLAIM STATUTES AND EQUAL PROTECTION OF THE LAW

The position of Mr. Boisvert throughout the conversion action was that it was barred by the prohibition of the cited Sections of the California Government Code on the grounds that appellant, (petitioner here), had not filed timely with the County Board of Supervisors a claim for the return of said recorder. This also was the apparent basis for the issuance of a writ of prohibition enjoining the prosecution of petitioner's action in the California courts.

The claim does not come within the provisions of the cited sections of the California Government Codes. If the damages caused by defendant Boisvert had been done while he was sitting as a Judge Pro Tempore, even then the immunity would not apply, and application of the cited sections of the California Government Code would not be pertinent because of lack of due process and acts in excess of jurisdiction.

Mr. Boisvert was a commissioner for the Superior Court of the State of California for the County of Los Angeles. He is qualified by appointment to such office to sit as a Judge Pro Tempore after stipulation by all parties.

The reporter's transcript and the pleadings herein show that:

1. No stipulation was executed as to Mr. Boisvert to hear that particular hearing.

2. An objection to Mr. Boisvert was stated to Judge Levitt, when the hearing was being assigned to Mr. Boisvert.

Under these circumstances, Mr. Boisvert was not sitting as a judge pro tempore, and none of his acts could have been done within the scope of his employment as a commissioner. He usurped the powers and authority of a judge and under these circumstances, the county or State may or may not have a liability to indemnify him, for any judgment secured against him.

CONCLUSION

In order to effectuate the protection of Constitutional rights, provided by the Bill of Rights, and by the 14th amendment to the Constitution of the United States and to implement the intent of the Congress of the United States as displayed in the popularly termed Civil Rights Acts, and to provide equal protection of the laws, to citizens who have actions against governmental entities from different procedural requirements for the same claims against private citizens arbitrarily imposed to minimize liability even in intentional torts, such as authorized actions to convert property in connection with erroneous contempt holdings the writ of certiorari should issue to preserve the basic rights given to citizens against arbitrary actions taken against them under color of State authority.

Respectfully submitted,

EVERT L. HAGAN,
In Pro Se.

DATED: September ....., 1966

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